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Human Rights Committee

Communication No. 1875/2009

Views adopted by the Committee at its 113th session (16 March–2 April 2015)

Submitted by:	M.G.C.
Alleged victims:	The author
State party:	Australia
Date of communication:	7 April 2009 (initial submission)
Document references:	Special Rapporteur's rule 92 and 97 decision, transmitted to the State party on 4 May 2009 (issued in document form)
Date of adoption of Views:	26 March 2015
Subject matter:	Deportation to the United States of America
Procedural issues:	Insufficient substantiation; non-exhaustion of domestic remedies
Substantive issues:	Arbitrary detention; expulsion of aliens lawfully in the territory; equality of arms and fair hearing; arbitrary interference with family life; best interest of the child
Articles of the Covenant:	9 (1); 13; 14, 17, 18 (4) and 23 (1) and (4); and 24 (1)
Articles of the Optional Protocol:	1; 2; 3; and 5 (2) (b)

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (113th session)

concerning

Communication No. 1875/2009*

Submitted by:	M.G.C.
Alleged victims:	The author
State party:	Australia
Date of communication:	7 April 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2015,

Having concluded its consideration of communication No. 1875/2009, submitted to the Human Rights Committee by M.G.C under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is M.G.C., an American national born on 1 July 1970. He claims that his rights under articles 18 (4), 23 (1) and (4) and 24 (1) of the Covenant would be violated if he were deported to the United States of America.[1] The author is not represented.

1.2 On 4 May 2009, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided not to request the State party to refrain from deporting the author to the United States. The author was removed from Australia on 8 May 2009.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

[1] In his comments dated 23 March 2011, the author made additional allegations under articles 9, 13, 14 and 17 of the Covenant.

Factual background[2]

2.1 The author arrived in Australia in June 1994 on a tourist (short stay) visa and married an Australian citizen in 1999. He obtained a spouse visa by virtue of his marriage. The author and his wife divorced on 25 August 2004. On 20 July 2005, the author's son was born out of a relationship with another woman, also of Australian citizenship, from whom he is now separated. On 29 May 2006, the Federal Magistrates Court granted the author "contact orders by consent", which allowed him to have contact with his son, with the consent of his ex-partner.

2.2 Between 1998 and 2002, the author committed a series of criminal offences. The offences involved the author fraudulently claiming income tax credits and opening and operating false bank and credit card accounts. On 13 November 2003, he pleaded guilty and was convicted in the Queensland District Court of a number of offences involving fraud and dishonesty. He was sentenced to a term of imprisonment. Some of his convictions were later set aside by the Supreme Court of Queensland sitting as court of appeal on the basis of an error in the indictment. After serving part of his sentence, the author was released on parole in October 2004.

2.3 On 1 June 2005, a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs (Minister for Immigration) decided that the author had not satisfied the "character test" under section 501 of the Migration Act, and the delegate exercised the discretion pursuant to section 501 (2) of the Act to cancel his visa. Under section 501 (6) (a), a person does not pass the character test if he or she has a substantial criminal record. A person who has been sentenced to a term of imprisonment of 12 months or more is considered as having a criminal record. The author had been sentenced to imprisonment for terms exceeding this period on 13 November 2003. As a result of the cancelling of his visa, the author became an "unlawful non-citizen" and was thus placed in immigration detention as of 20 October 2005, where he stayed until all pending proceedings were completed.

2.4 On 28 February 2007, the Administrative Appeals Tribunal affirmed the delegate's decision. It held that it was obliged to follow Ministerial Direction No. 21 (Direction – Visa Refusal and Cancellation under section 501 – No. 21) made pursuant to section 499 of the Act. The Tribunal noted that, under the Direction, the three primary considerations to be taken into account in exercising discretion under section 501 of the Act were: the protection of the Australian community; the expectations of the Australian community; and, in cases involving a parental or other close relationship between a child and a person under consideration, the best interest of the child.

2.5 In relation to the best interest of the child, the Tribunal agreed that it was generally in the best interest of a child to be with the parents. However, when considering the best interest of the author's son, it also stated that the author's son was only about 19 months old at the time of the hearing, that the author had been separated from him since he was taken into immigration detention in October 2005 and that, "although the author would have preferred not to have had such a lengthy period of forced separation from his son", there was no established relationship between the author and his son. The prospects of the author developing a close relationship with his son were doubtful given the author's estrangement from the mother. Although the relationship could not be qualified as hostile during the hearing, it was certainly strained. The author's risk of recidivism would, if it materialized,

[2] The factual background has been established on the basis of the author's account and court documents, with the addition of dates provided by the State party in its observations.

be harmful to the child's upbringing. On that basis, the Tribunal found that, for the reasons given and in the best interest of the child, the author's visa should be cancelled.

2.6 On 20 November 2007, the Federal Court dismissed the author's appeal and a further appeal to the Full Court of the Federal Court was dismissed on 5 September 2008. In both appeals, three main issues were in contention. First, the author contended that the Tribunal had erred in failing to consider the orders of the Federal Magistrates Court which gave the author contact with his child. The primary judge of the Court found that the Tribunal was aware of the orders of the Federal Magistrates Court. Given that those orders provided for only a minimal level of contact between the author and his son, it was open to the Tribunal to conclude that the development of a close relationship between the author and his son was nonetheless doubtful. The author further argued that the decision of the Federal Magistrates Court to issue contact orders in favour of the author was proof that it was in the best interest of the child. The Federal Court considered that the Tribunal was not bound by the views expressed by the Federal Magistrates Court. For reasons similar to those of the primary judge, the Full Court held that the Tribunal had not erred in determining the best interest of the author's son.

2.7 Secondly, the author argued that the Tribunal had mischaracterized the nature of the discretion it was exercising. Both the primary judge and the Full Court rejected that contention.

2.8 Finally, the primary judge and the Full Court rejected a submission that the Tribunal had failed to take into account relevant considerations, namely, the obligations of Australia under certain international instruments; the hardship he would experience if he were to lose contact with his son; and the fact that he had not been warned of the possibility that committing serious offences might jeopardize his visa. The Full Court noted that there was no occasion for the Tribunal to consider the effect of international instruments. Insofar as the author's own hardship could be considered relevant, no substantial evidence had been put to the Tribunal evidencing such hardship. Furthermore, even if it were relevant, it would have been impossible for the author to have been warned of the possibility of visa cancellation given that he was convicted of a number of offences on the same date. The author appealed against the Full Court's judgement on two occasions without success; thus the proceedings ended on 27 March 2009.[3]

2.9 In parallel, on 19 September 2008, the author also applied for a protection visa. On 8 October 2008, this application was refused on the basis that the author did not meet the definition of a refugee. On 15 October 2008, the author applied to the Refugee Review Tribunal, which, on 23 December 2008, affirmed the delegate's decision to refuse the author a protection visa.

2.10 On 3 April 2009, the author made submissions to the Minister for Immigration, requesting him to personally exercise his discretion under section 417 of the Migration Act, and in so doing take into consideration the Convention on the Rights of the Child. On 8 April 2009, the Minister for Immigration declined to consider exercising his section 417 power in the author's case.

The complaint

3.1 In his original submission, the author alleges a violation of articles 18 (4); 23 (1); 23 (4); and 24 (1) of the Covenant. In his comments, the author adds allegations under articles 9, 13, 14 and 17 of the Covenant (see paras. 5.1–7.12 and para. 9.4 below). The

[3] A number of subsequent procedural attempts before the Full Court resulted in a stay of deportation until 23 April 2009.

author also alleges a violation of articles 9 and 27 of the Convention on the Rights of the Child.

3.2 According to the undated notice of removal from Australia, the author will not be eligible for the grant of another Australian visa because his visa was cancelled under section 501 of the Migration Act (subsection 501 (6) (a) – substantial criminal record; and subsection 501 (6) (c) (i) and (ii) – character test). Under Schedule 5 – Special Return Criteria – of the Migration Act, eligibility for visa grant is affected permanently (permanent re-entry ban).

3.3 The author argues that no psychological assessment has been conducted or provided to him in determining his risk of recidivism, or the risk he poses to the Australian community. In addition, at no point throughout the various legal processes he engaged in whilst in immigration detention did the author have legal representation.

3.4 For most of his son's life, the author has been in immigration detention. He claims that, despite the detention, he has made efforts to be part of his son's life. On 29 May 2006 the author was given contact orders by consent for his son by the Federal Magistrates Court, a decision that, under Australian Family Law, implies that it was in the best interest of the child to maintain contact with his father. Since those contact orders are by consent, they put no obligation upon the child's mother to ensure that the author has access to his son. As the initial contact orders (currently still in force) are limited, on 7 April 2009 the author applied to the Family Court of Australia for full custody of his son (application was still pending at the time of submission and has no suspensive effect). In addition, the author's placement in immigration detention has hampered his ability to procure joint parental custody. The author argues that, owing to the difficult relationship he has with the mother of his child, he doubts that she will ensure that he maintains contact with his son once deported to the United States. The author further argues that he has spent more than a decade in Australia and has not kept any links with the United States, which would render his return there particularly difficult.

3.5 The authors claims that his deportation does not take into account the protection to which the family is entitled from the State, under the Covenant; and neither considers his rights as a father, nor the protection of his son required as a result of the breakdown in the relationship between the author and his ex-partner.

State party's observations on admissibility and merits

4.1 On 30 September 2010, the State party submitted its observations on admissibility and merits, stressing that the author had failed to substantiate his claims as he made no specific claims under the relevant articles but indicated in a general manner that his rights under the Covenant were dependent solely on his being allowed to remain in Australia and that his deportation would result in his being unable to enjoy any of the rights he claimed.

4.2 The State party rejects the author's claims under article 18 as inadmissible on the basis that he has failed to substantiate how his right to ensure the religious and moral education of his son in conformity with his own convictions has been breached. In addition, there is no evidence that his son is receiving education that is contrary to the author's own convictions.

4.3 Furthermore, those allegations are without merit. The author has not submitted any evidence that his son is receiving an education that includes instruction in a particular religion or belief, or that the State party has interfered with the religious and moral education of his son. There is nothing to suggest that the boy's mother, as his legal guardian, has expressed any concerns about her son's religious and moral education. There is no suggestion that the State party's public education system in general is in breach of the article. The State party adds that there is nothing in the nature of article 18 to suggest that

the author must be within the same jurisdiction as his son to exercise the right in question. The possibility that the author will have limited contact with his son as a result of the author's removal from Australia does not mean that the State party is infringing his right to ensure his son's religious and moral education.

4.4 With regard to the author's claims concerning articles 17 and 23 (1), the State party submits that the author has failed to substantiate these. He has not demonstrated that the State party's government failed to take into account his family circumstances in making the decision to cancel his visa. In fact, the State party's obligations under articles 17 and 23 were specifically considered by the delegate's Minister in making that decision. The issue was also explicitly considered in the decision of the Administrative Appeals Tribunal, which reviewed the delegate's decision.

4.5 In relation to the author's claims of alleged violations of his son's rights in respect of his father under article 24 (1), the State party considers these to be inadmissible owing to the failure to satisfy the "victim" requirement under article 1 of the Optional Protocol. The present communication has been submitted only in the name of the author, not his son. It is the right of the child which is protected under article 1, and it would be the author's son, not the author, who would be the victim of a violation of that right. On the merits, the author's removal has not resulted in a lack of protection for his son, whose mother remains his primary carer. In addition, there is no evidence that the State party's system does not provide the requisite measures of protection to minors. The best interest of the child was specifically considered by the State party when deciding whether to remove the author from Australia.

4.6 In relation to the author's right to seek custody of his son, those claims are inadmissible on the grounds of failure to exhaust domestic remedies. The author is not prevented from accessing the Australian family court system to obtain orders in relation to the care arrangements for his son, notwithstanding the fact that he is now located outside Australia. In the event that the parenting orders in relation to his son are current, the author can make an application to the court for variation of those orders on the basis that there has been a significant change in circumstances that warrants review of the final orders. In circumstances where one parent is living overseas and is not able to enter Australia, the courts will make a determination whether it is in the child's best interest to live overseas with that parent or to travel overseas to spend time with the parent, depending on the nature of the applications made to the court with respect to the care arrangements for that child.

4.7 Should the Committee find the author's allegations admissible under article 23 (1), the State party submits that they are without merit. The author cannot claim to be part of a family within the meaning of articles 17 and 23 on the basis of his relationship with his son. In addition to blood relationship and statutory forms of establishing relations (marriage, adoption), still further criteria are essential for the existence of a family.[4] In *Balaguer Santacana* v. *Spain*, the Committee outlined the minimal requirements for the existence of a family as "life together, economic ties, a regular and intense relationship".[5] The evidence before the Australian courts demonstrates that the contact between the author and his son has been minimal. While there is evidence that the author visited his son at the author's ex-partner's residence on 13, 20 and 28 August 2005, with subsequent visits taking place at the Building Bridges contact centre in Lutwyche, there was no evidence before the Administrative Appeals Tribunal that any subsequent visits occurred. The author's ex-

[4] The State party refers to Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised ed., 2005) 433 [50].

[5] See communication No. 417/1990, *Balaguer Santacana* v. *Spain*, Views adopted on 15 July 1994, para. 10.2.

partner also provided evidence to the Tribunal that the author had failed to honour the financial agreement made between them. The author himself admits that, as a result of his time in immigration detention, a strong relationship with his son had not been formed, that he had paid little child maintenance and had not seen his son in almost four years. The Tribunal considered that in no sense other than the purely biological could it be said that the author and his son constituted a family.

4.8 While it may have been difficult for the author to establish such a relationship with his son while he was in immigration detention, the author was detained on the basis that, following the cancellation of his visa, he had no lawful basis to remain in Australia. In addition, there was evidence before the Tribunal that the author was aware that his visa might be cancelled under section 501 of the Migration Act before his son was conceived. Whatever the circumstances in which the author was placed after the birth of his son, those circumstances were foreseeable by the author, and the fact that the author's son is an Australian citizen does not entitle him to claim "protection of the family" under the Covenant to prevent his removal.

4.9 If the Committee does not accept the State party's contention that the author does not constitute a family with his son within the meaning of articles 17 and 23, the State party submits that both the author's right to family and the best interest of the child were considered by the Tribunal, and that any interference was not arbitrary and was carried out in accordance with Australian law. The State party has a right to remove non-nationals on public grounds and, in the author's case, his family rights were balanced against the State party's legitimate interest in maintaining immigration control. The author was removed from Australia because he was an unlawful non-citizen and had no lawful basis to remain in Australia. As such, he was subject to removal under section 198 of the Migration Act. The author became an unlawful citizen because his spouse visa was cancelled on the grounds that he did not pass the character test under section 501 of the Migration Act. Indeed, the author had committed a series of offences between 1998 and 2002. While the convictions for a number of offences to which the author pleaded guilty were appealed on technical grounds, the six remaining offences of which he was convicted resulted in sentences of one and a half years imprisonment in each case.

4.10 In deciding whether to exercise the discretion conferred by section 501 (2) of the Migration Act, both the Minister's delegate and the Administrative Appeals Tribunal applied the then Ministerial Direction 21, taking into account three primary considerations which were (a) the protection of the Australian community and members of the community; (b) the expectations of the Australian community; and (c) in all cases involving parental or other close relationship between a child or children and the person under consideration, the best interest of the child. The Direction provided factors for the assessment which were: (a) the seriousness and nature of the conduct; (b) the likelihood of recidivism; and (c) whether the visa refusal or cancellation may prevent or discourage similar conduct.

4.11 Contrary to the author's claim, the Tribunal engaged in an analysis of the author's claims of rehabilitation for his drug use and of his risk of recidivism. On the basis of the evidence presented to the Tribunal, the latter concluded that the author's evidence in relation to his drug addiction was somewhat inconsistent and thus that he had not proven that he had overcome his drug addiction and was not a risk of further offending.

4.12 Also contrary to the author's claim, the Administrative Appeals Tribunal had considered the protection of the family and the best interest of the child. It took into account the fact that the author's son was only 19 months old at the time of its decision, that the author had been separated from his son since he was less than 4 months old, that there was no established relationship between the author and his son, and that the prospects of establishing such a relationship in the future were doubtful. The Tribunal further considered that the significant risk of recidivism, if it were to materialize, would be harmful to the

child's upbringing. While acknowledging the author's wish to remain in Australia to develop a parental relationship with his son, it considered that it was in the best interest of the child to cancel the author's visa. That decision was affirmed by two subsequent decisions in the Federal Court.

4.13 The Administrative Appeals Tribunal particularly looked at the author's contention that, by granting the author contact orders for his son, the Federal Magistrates Court was indicating that the best interest of the child would be served by allowing him to have contact with his father. The Tribunal considered however that it was not bound by the views of the Federal Magistrates Court and that it could form its own view of the best interest of the child. The Tribunal and the Minister's delegate had regard to the author's rights under articles 17 and 23 of the Covenant. They found that there would be no hardship for any immediate family members in Australia, apart from the author's son, if the author were removed from Australia. The issues in relation to the author's son were considered separately as part of an analysis of the best interest of the author's son.

4.14 The Committee has previously held that the separation of a person from his or her family could be regarded as arbitrary interference "if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal".[6] Due to the limited nature of the relationship between the author and his son, and the State party's legitimate interest in the protection of the Australian community from further offending by the author, his separation from his son was not disproportionate to the objectives of cancelling his visa. In *Canepa* v. *Canada*, the Committee accepted that, where an individual was to be deported to protect public safety from further criminal activity and there was no financial dependence involved in the author's family ties, there were no circumstances particular to the author or to his family which would lead the Committee to conclude that his removal was an arbitrary interference with his family. In addition, the Committee has considered that the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, is not sufficient of itself to make the proposed deportation of one or both parents arbitrary.[7]

4.15 The author claimed that at no point throughout the various legal processes engaged in whilst in immigration detention did he have legal representation. The State party acknowledges that the author did not have legal representation when he appeared before the Administrative Appeals Tribunal. However, he was represented in both appeal proceedings before the Federal Court, and in his request for the Minister to exercise his discretion under section 417 of the Migration Act. There were a number of ways in which the author could have sought assistance with the proceedings before the Tribunal. There is no entitlement to legal aid for immigration matters, except where a person is challenging the lawfulness of his immigration detention. However, migration advice and application assistance are available to clients in immigration detention through the immigration advice schemes in cooperation with legal aid organizations. A legal aid solicitor attends the Tribunal's registry on a weekly or fortnightly basis and can advise and give minor assistance to self-represented parties. The Tribunal also refers self-represented parties to community legal centres and other service providers that may be able to provide advice or representation. There is no evidence that, if he had wanted, the author was prevented from choosing a representative of his choice.

4.16 The State party notes the author's claim that, in removing him from Australia, the State party considered neither the author's rights as a father, nor the protection of his son

[6] See communication No. 558/1993, *Canepa* v. *Canada*, Views adopted on 3 April 1997, para. 11.4.

[7] See communication No. 930/2000, *Winata and Li* v. *Australia*, Views adopted on 26 July 2001, para. 7.3.

required as a result of the breakdown in the relationship between the author and his ex-partner. The State party considers such a claim inadmissible on the grounds that it was not substantiated. Should the Committee consider the author's claim admissible, the State party considers it to be without merit. The principle of equality of parenting responsibility underpins Australian family law. It is stipulated in section 61DA of the Commonwealth Family Law Act 1975 that, when making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility. The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for those responsibilities to be shared. The State party considers that the courts have made their assessments in conformity with the law.

4.17 The State party considers that the author's claims under the Convention on the Rights of the Child are inadmissible *ratione materiae* since the Committee is only competent to consider allegations of violations of any of the rights protected under the Covenant.

Author's comments on the State party's observations

5.1 On 23 March 2011, the author notes that he also considers that the State party has violated his rights under article 9 of the Covenant in that his placement in immigration detention was arbitrary. In a letter dated 20 October 2005, on the first day of his immigration detention, the author was informed that his "circumstances" were apparently "considered" prior to its decision to send him to Baxter Detention Centre, a high-security facility.[8] The author was never informed of the nature of those "circumstances". The Migration Act requires an unlawful non-citizen to be detained; however it does not require that he be detained within gated/secure facilities.

5.2 The author also contests the length of his detention, which in his view was neither necessary nor required to protect the Australian community. The Committee has previously considered that arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.[9]

5.3 The author notes that the Government was aware of his conviction and the factors relevant to it. In June 2004, the author was released as a result of the assessment by the Queensland Community Corrections Board of the author's circumstances and determining that he was suitable for release into the Australian community. If the Government of Australia was concerned about any risk that he may have posed to the community, having regard to his criminal history, then sufficient time was available to it between his conviction on 13 November 2003 and the Board's decision of June 2004 to cancel his visa and prevent his release into the community. The author refers to the jurisprudence of the Committee, where it has considered that, although immigration detention for administrative purposes is not arbitrary per se, prolonged detention for such purposes may be arbitrary where it continues beyond the period for which a State party can provide appropriate justification.[10] In his case, all relevant sentences formally ended in September 2005, one month prior to the commencement of his immigration detention. By that time, he had been in the community for one year and had reported to the parole office regularly and without incident.

[8] Baxter detention facility was closed in 2007. The author was then detained at Villawood Detention Centre until his removal.

[9] See communication No. 305/1988, *Van Alphen* v. *The Netherlands*, Views adopted on 23 July 1990, para. 5.8.

[10] See communication No. 1050/2002, *D. and E.* v. *Australia*, Views adopted on 11 July 2006, para. 7.2.

5.4 The State party has not demonstrated that other less intrusive measures could not have achieved the same ends, that is presenting himself for removal if the time eventually came. For instance, the imposition of reporting obligations or radio monitoring tags, would have allowed him monitored movement within the community, something he had already been able to demonstrate while on parole. At that time, he had a child whom he wanted to see on a regular basis.

5.5 The author contends that three and a half years in detention is unreasonable and unjust in any circumstances, considering that he had spent two and a half years in prison for what could be considered more serious matters. In Australia there is no facility which would have allowed him to review the basis of his detention beyond the issue of whether or not he answered to the description of "unlawful non-citizen". The claims of the State party concerning his alleged provision of false and misleading claims in 2004 were more than five years "stale" at the time of his removal in May 2009 and the Australian Government relied upon those factors as a barrier to his release and/or grant of a visa. Separately from the above, the author considers that the decisions to cancel his visa were unlawful, rendering his detention and removal unlawful.

5.6 The State party did not provide evidence that a review of his detention took place or that, if it did, such review was conducted in accordance with the rules of natural justice. The Australian Government did not contest that point. The lack of judicial review for detainees has been the subject of much debate and criticism.[11]

5.7 The provision under which the author was removed, section 198 (6) of the Migration Act, calls for a person to be removed if that person is a whose application for a visa has been refused and finally determined. The author became a detainee by way of a visa cancellation under section 501 of the Migration Act, not as a result of a failed application for a visa. He held a valid visa prior to its cancellation and, until September 2008, his matters before the Administrative Appeals Tribunal and Federal Courts were for the sole purpose of having that cancellation overturned, not for the purpose of applying for a visa. The relevant removal provision could not have applied to him until, at the earliest, September 2008, rendering any detention prior to that period arbitrary and for a purpose not lawfully achievable under the Migration Act 1958. There is no provision in the Migration Act that purports to give authority to the Australian Government to, inter alia, detain a person for the purposes of removing him from Australia if that person became a detainee by way of a visa cancellation under section 501. The author considers that words should be given their ordinary meaning. The author therefore alleges that his detention was unreasonable, unnecessary, disproportionate, inappropriate, unjustifiable and arbitrary pursuant to article 9 (1) of the Covenant.

5.8 The author further contends that his removal was not carried out in accordance with law, in violation of article 13 of the Covenant. He claims that the Australian Government violated the rules of natural justice and/or procedural fairness when it made its decisions (whether the original delegate's decision or the Administrative Appeals Tribunal's decision). During the proceedings, the author's ex-partner was called as a witness to the proceedings and she claimed that she had been a victim of domestic violence by the author. The latter alleges that he had not seen the evidence presented by his ex-partner and the cross-examination was carried out without the author having been presented with the evidence beforehand. The author further contends that issues related to his relationship with his ex-partner were held against him in the proceedings when he did not know that such

[11] See Background paper: immigration detention and visa cancellation under section 501 of the Migration Act (January 2009).

conduct would constitute a crime under Australian law. For all those reasons, the author considers that the State party has violated his rights under article 13 of the Covenant.

5.9 The author alleges that the facts above also constitute a violation of article 14 on the grounds of failure to provide equality of arms. The State party was aware of the accusations presented by the author's ex-partner as early as April 2005, well before the Administrative Appeals Tribunal hearing date. The author does not understand why that piece of evidence was not presented well in advance to the author to enable him to contest it prior to cross-examination. Because he was arbitrarily held in immigration detention for a lengthy period of time, he was not in a position to prove that he could live in the Australian community without posing a threat to the community. Such detention also deprived him of the possibility to continue a relationship with his son and thereby serve his best interest. The author adds that before the Minister for Immigration released his decision regarding the author, he stated publicly that "there [were] a large number [of the current detention population] who are serious risks to the community" and that he had "no intention of releasing these persons". Releasing such a statement before a formal decision was made on his case was a violation of the right to a fair hearing because the Minister had already made up his mind before considering the evidence.

5.10 Regarding the term "family" under article 17, according to the Committee's jurisprudence the objectives of the Covenant require that the term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.[12] During his detention, the author sought and received contact orders with his son via the Family Court. The orders granted are proof that the organ most competent in family law has acknowledged a familial connection between himself and his son. The author and his son therefore constitute a family for the purposes of article 17. He considers that his family has been unlawfully interfered with because the decisions to cancel his visa and his subsequent detention were not made in accordance with the law, as explained in his contention on article 13. In addition, the immigration detention was the only reason why he was separated from his son. If, despite the detention, he had been able to secure orders to see his son, the author considers that he would have been able to maintain an even stronger relationship outside jail. The estrangement between the author and his ex-partner should not be used as an excuse to find that any further relationship between the author and his son was unlikely.

5.11 The lack of contact with his son due to immigration detention cannot lead to a family not being one. Otherwise, many fathers separated from their son for reasons beyond their control would be viewed through the same lens. In its observations, the State party has suggested many avenues which the author could pursue in order to see or have some contact with his son. However, since the author's ex-partner has been uncooperative with regard to resolving the matter privately and, since the author does not have the money to mount any legal challenge in the courts, it is unlikely that he could effectively avail himself of the options suggested by the State party, and, even if he did, his ex-partner has little incentive to follow any orders of the court. Moreover, the author should not have to resort to the measures advanced by the State party when the very reasons underlying his lack of contact with his son are the State party's unlawful decisions.

5.12 The author concludes that the State party has violated his rights under articles 9, 13, 14 and 17 of the Covenant. The author proposes a set of remedies for the violations which occurred in this case, including compensation and return to Australia.

[12] See general comment No. 16 (1988) on article 17 (right to privacy), para. 5.

Additional observations from the State party

6.1 On 1 November 2012, the State party challenges the merits of the author's claims under article 9 as the power under section 198 (6) was validly exercised and the immigration detention of the author prior to his removal was not arbitrary.

6.2 As stated in the notice of "Your Removal From Australia" provided to the author, the purpose of section 198 (6) is to authorize the removal of a detainee who has been immigration cleared, whose application for a visa has been refused and finally determined. The author made a valid visa application for a Protection visa, which was refused on 8 October 2008 and finally determined by the Refugee Review Tribunal on 23 December 2008 before the author's removal from Australia on 8 May 2009. Section 198 (6) was therefore validly applied.

6.3 The author's detention occurred in accordance with procedures established by the Act and is therefore lawful. Noting that the Committee has found that detention of non-citizens who do not hold a valid visa is not arbitrary per se, the State party submits that the policy rationale for the immigration detention laws of Australia must be considered in order to demonstrate that the law is not arbitrary and does not breach article 9. The detention of unlawful non-citizens at the end of a term of criminal custody may be necessary to ensure that a person who does not hold a valid visa for Australia is available for removal unless a basis to lawfully remain in Australia is established. This approach is consistent with the fundamental principle of sovereignty in international law, which includes the right of a State to control the entry of non-citizens into its territory. Furthermore, the author's detention continued while he pursued appeals over a three-year period of the original Administrative Appeals Tribunal decision that his visa was validly cancelled.

6.4 The State party challenges the admissibility of the author's claims under article 13 on the grounds of failure to exhaust domestic remedies. The various breaches of the principles of natural justice alleged by the author could validly have been the subject of an appeal to the Federal Court if he believed that the Tribunal had erred on a question of law, pursuant to section 44 of the Administrative Appeals Tribunal Act 1975. No such claim was brought before the judiciary in the author's appeals to the Federal Court, the Full Court of the Federal Court and the High Court of Australia. On the merits, for the reasons mentioned above, section 198 (6) was validly applied. The author's visa cancellation was conducted in accordance with the relevant provisions of the Act and he was permitted to submit reasons against his expulsion and have his case reviewed by the competent authorities. The author also claims that he was not informed that his conduct in making false and misleading statements to the Minister for Immigration was being considered as a possible violation of Australian criminal law as a reason for cancelling his visa. However, the author's visa was cancelled under section 501 of the Act by reason of his substantial criminal record. The author's claims under article 13 are therefore also without merit.

6.5 The State party considers the author's claims under article 14 inadmissible *ratione materiae* since article 13 applies to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If the legality of an alien's entry or stay is in dispute, any decision on that point leading to his expulsion or deportation ought to be taken in accordance with article 13.[13] The Committee has confirmed this approach in its jurisprudence, stating that such cases fall under article 13, not article 14, of the Covenant.[14] The State party further argues that the author's claim under article 14 is inadmissible on the grounds of failure to exhaust domestic remedies in the same way as his

[13] General comment No. 15 (1986) on the position of aliens under the Covenant, para. 9.

[14] See, inter alia, communication No. 1455/2005, *Kaur* v. *Canada*, decision on inadmissibility of 30 October 2008, para. 7.5.

claims under article 13. In addition, the general statement made by the Minister (see para. 5.9 above) does not provide any evidence of bias in the Minister's consideration of whether an individual is in fact a serious risk to the community or not. The author has not substantiated any basis on which any link between the Minister's statement and the author could be made.

6.6 On the merits, the State party submits that the purpose of the Ministerial intervention is to act as a "safety net" in exceptional circumstances and that it can be exercised discretionarily. The author had ample opportunity for a fair hearing before the Administrative Appeals Tribunal, the Federal Court and the Full High Court of Australia. Article 14 has therefore not been violated.

6.7 As for article 17, apart from making general statements about fathers separated from their sons, the author has not provided any evidence to suggest that there is or will be any close relationship with his son. The decision to cancel his visa and remove him was taken on the basis that he had committed a series of offences. The State party had a legitimate interest in the protection of its community. The relationship between the author and his son was fully considered by the Administrative Appeals Tribunal and the author did not provide evidence to conclude that that assessment was incomplete or in error, nor was the issue raised by the author in his appeals to the Federal Court or the High Court of Australia. The State party reiterates that there are a number of measures the author could take to seek contact with his son. On the merits, the State party reiterates its earlier submission.

Further submissions from the parties

7.1 On 4 November 2012 and 21 January 2013, the author reiterates his allegations and adds that he has been the victim of a denial of natural justice since the domestic authorities made a finding of criminal wrongdoing in circumstances where no charge or conviction for such matters existed and where no notice that the matter would be considered was put to him. Indeed, in 2003, the author was charged with four state offences and 15 Commonwealth offences. The four state offences were then quashed. However, in 2005, the Supreme Court of Queensland, sitting as court of appeal, allegedly took the author's state offences into account when determining his sentence for the Commonwealth offences.

7.2 The fact that the author applied for, and was refused, a Protection visa does not account for the time he spent in detention from 20 October 2005 until the time of his visa application in September 2008. Even if the author's removal under section 198 (6) of the Migration Act was for a purpose achievable under the Act, that purpose did not come into being until the author's visa application of September 2008.

7.3 With regard to the statement made by the Minister before making his decision in the author's case, the author maintains his position that making such a statement prior to the conduct of his review has violated his right to a fair hearing.

7.4 On article 17, the author maintains that the State party has unlawfully created the vast distance between the author and his son and then seeks to take advantage of that fact by pointing to what it believes to be a paucity of evidence supporting a claim that he and his son will ever have a close relationship. Since he was removed from Australia, the author has kept contact with his son via Skype and telephone.

8. On 23 December 2013, the State party understands the author's further allegations to mean that, to the extent that the then Minister for Immigration relied on the allegedly unlawful state sentences to cancel his visa, detain and deport him, those actions were also unlawful. The State party considers such allegations to be unsubstantiated and without merit. The State party considers that the sentencing judge acted in accordance with her obligations under the Crimes Act 1914 (Commonwealth offences) and the only identifiable sentencing error was corrected in 2005 when the author's state offences were quashed.

Furthermore, irrespective of the quashed state offences, the author retained a substantial criminal record for fraudulently obtaining monies from the Commonwealth Government, banks and other institutions. The Minister therefore appropriately relied on the Commonwealth sentences when exercising his discretion to cancel the author's visa. As regards the decisions to cancel the author's visa, they were reviewed and considered. No error of law was identified.

9.1 On 13 January 2014, the author notes that the Supreme Court of Queensland has erred in law; however the author only came to know about it when he was back in the United States. Had those errors been spotted in time and had the author been adequately represented during the proceedings, he would have been sentenced to less than the 12 months required for the character test to apply and he might not have been removed from Australia. The Commonwealth sentences of 12 months or more, handed down on 13 November 2003 by the District Court of Queensland, impermissibly took into account the state offences under the Crimes Act 1914. The decision of the District Court of Queensland therefore lacks effect and could not be the basis for concluding that the author's "substantial criminal record" constituted a ground for his removal from Australia.

9.2 The author further argues that, while in detention, he was forbidden from working in order to pay for his legal defence before the Administrative Appeals Tribunal. Article 14 was therefore violated as the hearing before the tribunal was unfair.

9.3 With regard to the State party's contention that he has failed to exhaust domestic remedies, the author replies that the Minister's decision was appealed against to the Tribunal. The author then appealed to the Federal Court, then the Full Court of the Federal Court and then the High Court of Australia. He has therefore exhausted domestic remedies. If further remedies were to be pursued, the author could not exhaust them owing to a lack of financial resources.

9.4 The author therefore considers that the State party has violated his rights under articles 9 (1), 13, 14 and 17 (1) of the Covenant.[15]

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

10.2 The Committee has ascertained, as required under article 5 (2) (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee notes that the State party challenges the admissibility of the author's claims under article 13 on the grounds of failure to exhaust domestic remedies since the various breaches of the rules of natural justice and/or procedural fairness hereby alleged by the author could validly have been the subject of an appeal to the Federal Court if he believed that the Administrative Appeals Tribunal had erred on a question of law. The Committee notes the author's reply that he came to know about those breaches only once he was back in the United States and that, in any event, he exhausted domestic remedies in Australia by appealing against the Tribunal's decision to the Federal Court, the Full Federal Court and the High Court of Australia and that he does not have the financial means to

[15] The author no longer refers to allegations under articles 18, 23 and 24 of the Covenant.

introduce new claims. The Committee notes that, in his appeals against the Tribunal's decision, the author has not made such claims as those now submitted to the Committee. In the circumstances, the Committee considers that the author has not exhausted domestic remedies for that purpose. The Committee reiterates its jurisprudence according to which financial considerations or doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them.[16] The Committee therefore declares that part of the communication inadmissible under article 5 (2) (b) of the Optional Protocol.

10.4 The Committee further notes the author's claim under article 14 that he was denied a fair hearing before the Tribunal because he was denied the opportunity to assess the evidence presented against him well before the hearing. He also alleges that the Minister's public statement prior to his decision to refuse to intervene prejudged the outcome of the said decision. The State party has challenged the author's allegation on the grounds of non-substantiation and of failure to exhaust domestic remedies. On the latter, the Committee notes that the author has indeed not brought his claim under article 14 before the relevant domestic authorities. The Committee declares that part of the communication inadmissible on the grounds of failure to exhaust domestic remedies, pursuant to article 5 (2) (b) of the Optional Protocol.

10.5 The Committee notes the State party's challenge to the admissibility of the author's allegation under article 18 (4), on the basis that the author has failed to substantiate how his right to ensure the religious and moral education of his son in conformity with his own convictions has been breached. The Committee notes that the author has not responded to the State party's arguments. The Committee therefore declares that part of the communication inadmissible on the grounds of insufficient substantiation under article 2 of the Optional Protocol.

10.6 The Committee notes the author's allegation that the State party has violated his rights under article 24 (1). It notes the State party's contention that such allegation is inadmissible *ratione personae*. The author has not challenged such argument. The Committee considers that part of the communication inadmissible, pursuant to article 1 of the Optional Protocol.

10.7 The Committee also notes that the author has invoked two provisions of the Convention on the Rights of the Child. The Committee reiterates that its competence is to monitor States parties' compliance to the Covenant. That part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

10.8 The Committee notes the author's allegation that his expulsion has led to arbitrary interference in his family life in breach of articles 17 and 23. The State party challenges the admissibility of the communication on the grounds of failure to substantiate that the authorities did not take into account the author's family circumstances prior to his removal. In his comments, the author has shifted his claims under article 23 to a claim under article 17. The Committee notes that both allegations are interlinked and that they are closely linked to the merits of the case. It further considers that the author has sufficiently substantiated his claims for the purposes of admissibility. The Committee therefore declares the author's allegations under articles 17 and 23 admissible pursuant to article 2 of the Optional Protocol.

10.9 The Committee finally notes the author's allegation that his immigration detention was arbitrary, that it was unreasonably prolonged and that he was unable to challenge the legality of his detention before the Australian Courts, in violation of article 9 of the

[16] See, inter alia, communication No. 1576/2007, *Yussuf N. Kly* v. *Canada*, decision on inadmissibility of 27 March 2009, para. 6.4.

Covenant. The Committee notes that the State party has not contested the admissibility of the author's allegation. The Committee considers that the author has sufficiently substantiated his allegation under article 9 for the purposes of admissibility, pursuant to article 2 of the Optional Protocol.

10.10 The Committee declares the communication admissible insofar as it appears to raise issues under articles 9, 17 and 23 of the Covenant, and proceeds to its consideration on the merits.

Consideration of the merits

11.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

11.2 With regard to article 9, the Committee notes the author's allegation that his immigration detention was arbitrary, unreasonably prolonged and that he was unable to challenge the legality of his detention. The Committee notes the State party's argument that the author's detention occurred in accordance with procedures established by the Migration Act; that the detention of unlawful non-citizens at the end of a term of criminal custody may be necessary to ensure that a person who does not hold a valid visa for Australia is available for removal unless a basis to lawfully remain in Australia is established; and that the author's detention continued while he pursued appeals over a three-year period of the original Tribunal's decision that his visa was validly cancelled.

11.3 The Committee considers that the author's detention and subsequent removal were carried out in accordance with Australian law, which allowed the cancellation of his visa pursuant to section 501 of the Migration Act by reason of his substantial criminal record; his detention under the Migration Act as an "unlawful non-citizen";[17] and his removal under section 198(6) following the conclusion of his final attempt to remain on Australian soil through his Protection visa application. Notwithstanding such considerations, the Committee ought to determine whether such detention, while in conformity with Australian law, was arbitrary as alleged by the author.

11.4 The Committee notes that it is uncontested that the author was released in June 2004 as a result of the Queensland Community Corrections Board determination that he was suitable for release into the Australian community. It further notes that the author was released on parole and allegedly reported without incident for a year before the decision of the delegate's Minister to cancel his visa for having a substantive criminal record. The author was placed in immigration detention one year after his release on parole, on 20 October 2005. He remained in detention until his removal on 8 May 2009, three and a half years later.

11.5 The Committee recalls that the notion of arbitrariness is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. Detention in the course of proceedings for the control of immigration is not arbitrary *per se*, but the detention must be justified as being reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. To detain immigrants further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others, or a risk of acts against national security.[18] The decision must

[17] See section 189 of the Migration Act.

[18] See general comment No. 35 on article 9 (liberty and security of person), para. 18.

consider relevant factors case by case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[19]

11.6 According to the information before the Committee, the author became an "unlawful non-citizen" as a result of the cancelling of his visa and, pursuant to the Migration Act 1958, was automatically placed in immigration detention until his removal, which eventually occurred three and a half years later. During that time, the authorities of the State party made no individual assessment of the need to maintain the author in immigration detention. The Committee considers that the State party has not demonstrated on an individual basis that the author's continuous and protracted detention was justified for such an extended period of time.[20] The State party has also not demonstrated that other, less intrusive, measures could not have achieved the same end, of compliance with the State party's need to ensure that the author would be available for removal (see para. 6.3 above). Furthermore, the author was deprived of the opportunity to challenge his indefinite detention in substantive terms. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant.[21] For all those reasons, the Committee concludes that, in the present circumstances, the detention of the author violated his rights under article 9 (1) of the Covenant.

11.7 The Committee notes the author's allegation that his expulsion constitutes an arbitrary interference with his family life under articles 17 and 23. The Committee first notes the State party's argument that the author and his son did not constitute a family under articles 17 and 23, as their contact was minimal.

11.8 The Committee recalls its general comment No. 16, whereby the concept of the family is to be interpreted broadly.[22] The concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child.[23] The Committee cannot exclude that the author and his son had family ties beyond the biological since the author has obtained contact orders from the Federal Magistrate Court and those contact orders were not implemented for a number of reasons, including the fact that his ex-partner and the author had a strained relationship and the mere fact that the author was in immigration detention. Therefore the Committee considers that the decision of the State party to deport the author, with the effect that this may have of a permanent impact on his relationship with his son, coupled with a permanent re-entry ban, is to be considered "interference" with the family.

11.9 The issue arises as to whether or not such interference would be arbitrary and contrary to articles 17 and 23 (1) of the Covenant. The Committee recalls that even interference provided for by law should be in accordance with the provisions, aims and

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[19] See general comment No. 35 (see footnote 21), para. 18. See also communications No. 2136/2012, *M.M.M. et al.* v. *Australia*, para. 10.3; and No. 1014/2001, *Baban* v. *Australia*, Views adopted on 6 August 2003, para. 7.2

[20] See communication No. 2094/2011, *F.K.A.G. et al.* v. *Australia*, Views adopted on 26 July 2013, para. 9.4.

[21] See, inter alia, communications No. 2094/2011, *F.K.A.G. et al.* v. *Australia*, (see footnote 23), para. 9.6; and No. 1014/2001, *Baban* v. *Australia* (see footnote 22), para. 7.2.

[22] See general comment No. 16 (see footnote 14), para. 5. See also communication No. 1959/2010, *Warsame* v. *Canada*, Views adopted on 21 July 2011, para. 8.7.

[23] See communication No. 417/1990, *Balaguer Santacana* v. *Spain* (see footnote 7), para. 10.2.

objectives of the Covenant and should be reasonable in the particular circumstances.[24] In the light of the information before it, the Committee finds that the State party's decision to cancel the author's visa was based on objective and reasonable grounds, namely the author's substantial criminal record, while taking into account the author's family circumstances both in the delegate Minister's decision and in the decision of the Administrative Appeals Tribunal. In the particular circumstances, the Committee considers that the author's personal family situation has been thoroughly assessed by the competent authorities and that the interference with the author's family life which has occurred is therefore not arbitrary within the meaning of article 17 of the Covenant. The Committee concludes that the facts before it do not reveal a violation of articles 17 and 23 of the Covenant.

12. The Human Rights Committee, acting under article 5 (4), of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 9 of the Covenant.

13. In accordance with article 2 (3) (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including compensation. The State party is also under an obligation to prevent similar violations in the future. In this connection, the State party should review its migration legislation to ensure its conformity with the requirements of article 9 of the Covenant.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, to have them translated into the official language of the State party and widely distributed.

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[24] See communication No. 2243/2010, *Husseini* v. *Denmark*, Views adopted on 24 October 2014, paras. 9.3–9.4.